IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3138 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT GAS CO. LTD.

Versus

JT. COMMISSIONER OF INCOME - TAX (ASSESMENT)

Appearance:

MR JP SHAH for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE K.M.MEHTA

Date of decision: 18/04/2000

C.A.V. JUDGEMENT (Per Patel, J.).

1. The petitioner-Gujarat Gas Co is a Public Limited Company having its registered office at Ahmedabad. In the present matter the petitioner has challenged the order of assessment dated 31.3.1999 passed by the Joint Commissioner of Income Tax (Assessment) Special Range-8, Ahmedabad.The Assessing Officer after relying upon the circular No.549, para 5.12 dated 31.10.1989 issued by the Central Board of Direct Taxes(hereinafter referred to as "CBDT") has held that the petitioner's total income is Rs.2,11,81,620/-, however, as the assessee has filed return of Rs.5,13,86,320/- he shall have to pay the tax on the returnable income in view of the instructions contained in the aforesaid circular. The petitioner has prayed for writ of certiorari quashing and setting the said assessment order and also prayed for writ of mandamus for refund of Rs.1,69,80,360/- with interest at the rate of 15% p.a. from 1.4.99 till the date of refund.

FACTS:

2. In this case, we are concerned with the assessment year 1996-97. The petitioner has filed return on 30.11.1996 showing taxable income of Rs.5,13,86,320/-. The return was processed under section 143(1)(a) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") after making some primafacie adjustment on 7.10.97. Thereafter, notices under sections 143(1) and 142(2) of the Act came to be issued and the petitioner came to be assessed under section 143(3) of the Act by order, dated 31.3.1999. The Assessing Officer by his order has held that though the total income of the assessee was Rs.2,11,81,620/-, the assessee was liable to pay tax on the total income of Rs.5,13,86,320/- on the ground that in accordance with circular No.549, para 5.12 dated 31.10.1989 the assessed income shall not be less than returned income.

STATUTORY BACKGROUND:

3. Before we appreciate the contentions raised, we take into consideration the relevant statutory provisions in this behalf:

Section 119 of the Act reads as follows:

"119. Instructions to Subordinate Authorities:

(1) The Board may, from time to time, issue

such orders, instructions and directions to other Income Tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be issued--

(a) so as to require any income tax authority to make a particular assessment or to dispose off a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Deputy Commissioner (appeals) or the Commissioner (Appeals) in the exercise of his appellate functions.

(2) Without prejudice to the generality of the foregoing power,--

(a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time,(whether by way of relaxation of any of the provisions of sections 143, 144, 147, 148, 154, 155, 210, 271 and 273 or otherwise) general or special orders in respect of any class of incomes or class of cases, setting forth directions or instructions (not being prejudicial to assessees) as to the guidelines, principles or procedures to be followed by other income tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of the opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information;

(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases by general or special order, authorise any income tax authority, not being a Deputy Commissioner (Appeals) or Commissioner (Appeals) to admit an application or claim for any exemption, deduction, refund or any other relief under this

Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law".

Section 143 provides for "Assessment"

3(A) Sections 143(2), (3) and (4) of the Act read as under:

Section 143(1) ... ...

(2) Where a return has been made under section 139, or in response to a notice under subsection (1) of the section 142, the Assessing Officer shall, if he considers it necessary or expedient to ensure that the assessee has not understated in the income or has not computed excessive loss or has not underpaid the tax in any manner, served on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return;

Provided that no notice under this subsection shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.

(3) On the day specified in the notice issued under subsection (2) or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make the assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment.

(4) Where a regular assessment under subsection (3) of this section or section 144 is made,--

(a) any tax or interest paid by the assessee under subsection (1) shall be deemed to have been paid towards regular assessment;

(b) if no refund is due on regular assessment

or the amount refunded under subsection (1) exceeds the amount refundable on regular assessment, the whole or the excess amount so refunded shall be deemed to be tax payable by the assessee and the provisions of the Act shall apply accordingly.

(5) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988) shall apply to and in relation to any assessment for the assessment year commencing on the Ist day of April, 1988 or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.

(Explanation-- An intimation sent to the assessee under subsection (1) or subsection (1B shall be deemed to be an order for the purpose of Section 246 and 264).

Relevant portion of the circular No.549, dated 31.10.1989, F.No.131/39/89-TP on which reliance is placed reads as under:

Procedure for assessment: New Scheme of Assessment:

"5.12. Since under the provisions of subsection (1) of the new section 143, an assessment is not to be made now, the provisions of subsections (2) and (3) have also been recast and are entirely different from the old provisions. A notice under subsection (2) which will be issued only in cases picked up for scrutiny, is now issued only to ensure that the assessee has not understated his income or has not computed excessive loss or has not underpaid the tax in any manner while furnishing his return of income. This means that, under the new provisions, in assessment order passed under section 143(3) in a scrutiny case, neither the income can be assessed at a figure lower than the returned income, nor loss can be assessed at a figure higher than the returned loss, nor a further refund can be given except what was due on the basis of the returned income, and which would have already been allowed under the provisions of section 143(1) (a)(ii)."

3(B) The Section 119 of the Act provides that the highest Executive Authority is the Central Board of Direct Taxes which is constituted under the Central Boards of Revenue Act 1963. Its powers of administration, supervision and control extend over the whole Department: it has power to make rules and to issue orders, instructions and directions to all officers and persons employed in the execution of this Act with two exceptions: (a) it can not interfere with the discretion of the CIT(A) or Dy.CIT(A) in the exercise of his appellate functions (proviso (b) to Sec.119(1) and (b) it can not direct any income tax authority to make a particular assessment or to dispose of a particular case in a particular manner. The later principle was implicit in Sec.119 prior to its amendment. However, the Board has the power to issue general circulars which are binding on the department. In other words, the quasi judicial functions of an Income Tax authority can not be controlled by the Board in a particular case, but they can be so controlled to the extent that general directions are issued by the Board.

3(C) Under section 143, as amended from 18.9.90, procedure of assessment has been stated. Under section 143(2) the Assessing Officer should issue notice and after issuing notice regular assessment order should be made under section 143(3) of the Act. The assessment has to be made on all relevant materials and on evidence and the assessee ordinarily has the fullest right to inspect the records and all documents and materials that is to be used against him. The proceedings before the Assessing Officer are "judicial proceedings" and all the incidents of such judicial proceedings have to be observed before the result is arrived at. In other words, the assessee would have a right to inspect the records and all relevant documents before he is called upon to lead evidence in rebuttal. The quasi-judicial proceedings must conform to the rules of natural justice. The Assessing Officer must proceed without bias and give sufficient opportunity to the assessee to place his case before him, he must conduct the proceedings in accordance with principles of justice, equity and good conscience.
SUBMISSION OF PETITIONER:

4. The petitioner in para 6 of his petition pointed out that for abundant caution, the petitioner is going to prefer an appeal before the C.I.T. (Appeals), but the word of Board has tremendous weight on the Executive Officer and he had no hope that the appeal will be an effective remedy. He further pointed out that the petitioner is not liable to pay any tax and there is no

chance of the appeal being heard even in near future and will be heard after a period of 4 years. The petitioner under these circumstances submitted that in the facts and circumstances of the case, when the interpretation of section is not correctly understood by the Assessing Officer in view of circular of C.B.D.T., it would be in the fitness of things to entertain this petition more particularly the remedy which is provided under the statute is not an efficacious alternative remedy. He orally also submitted that in any view of the matter, the CIT (Appeals) who has jurisdiction to hear the appeal is bound by the instructions contained in the Circular No.549, dated 3.10.1989 issued by the CBDT, so remedy provided by way of appeal is futile. The Division Bench (Coram: R. Balia & A.R.Dave, JJ) issued rule which was made returnable on 3.5.99. After the long delay, on behalf of respondent one Sushilkumar Agarwal, JCIT Spl.Rg.8 has filed affidavit wherein in para 2 it has been contended as under:

> "2. I submit that in view of Circular No.549 dated 31.10.1989, a copy of which is annexed hereto and marked Annexure-1, the petitioner is not entitled to the reliefs prayed for in the petition. I submit that the Assessing Officer has acted as per the circular issued by the CBDT, under Section 119 of the Income Tax Act. In the humble submission of the deponent a writ can not be issued so as to direct the Assessing Officer to do an act which is in contravention of the circular."

It was further contended that the petitioner has already availed of the alternative remedy by way of filing an appeal before the Commissioner of Income Tax (Appeals), and therefore the present petition is not maintainable. Nothing more is stated than extracted above by the respondent.

5. The learned counsel for the petitioner-Mr.J.P.Shah has stated that sometimes an authority entrusted with a power does not exercise that power but acts under the dictation of a superior authority. Here an authority invested with the power purports to act on its own but "in substance" the power is exercised by another. The authority concerned did not apply its mind and take action on its own judgment, even though it was so intended by the statute. In law, this amounts to non-exercise of power by the authority and the action is bad. The learned counsel for the petitioner Mr.J.P.Shah has stated that in this case the Assessing Officer has not exercised his jurisdiction independently

and has relied upon the Board circular No.549, dated 31.10.89, particularly para 5.12 which we have extracted earlier.

6. In support of the above submission, Mr.Shah Ld.counsel for the petitioner, relied upon the following authorities:

6(A) COMMISSIONER OF POLICE, BOMBAY vs GORDHANDAS BHANJI reported in AIR 1952 SC 16. In this case the the Commissioner of police granted licence for construction of cinema theatre but later on the permission was cancelled wherein the Commissioner has observed as follows:

> "I am directed by the Government to inform you that the permission to erect a cinema at the above site granted to you under this office letter.... dated 16th July, 1947 is hereby cancelled".

Therefore, the Supreme Court in paras 17 and 24 has observed as follows:

> "17. It is clear to us from a perusal of these rules that the only person vested with the authority to grant or refuse a licence for the erection of a building to be used for the purpose of public amusement is the Commissioner of Police. It is also clear that under Rule 250 he has been vested with the absolute discretion at any time to cancel or suspend any licence which has been granted under the rules. But the power to do so is vested in him and not in the State Government and can only be exercised by him at his discretion. No other person or authority can do it.
>
> 24. Taking the second first, it is evident from the rules that there is no specific law which requires the Commissioner to grant a licence on the fulfillment by the petitioner of certain conditions. He is vested with a discretion to grant or to refuse a licence and all that the law requires is that he should exercise that discretion in good faith. But that he has done. In the exercise of that discretion he granted a licence and that licence still holds good because, on the view we have taken there has been no valid order of cancellation."

and thereby the Honourable Court has allowed the

petition.

6(B). Mr.J.P.Shah, learned advocate for the petitioner relied upon the judgment of the Supreme Court in the case of B.RAJAGOPALA NAIDU vs THE STATE TRANSPORT APPELLATE TRIBUNAL reported in AIR 1964 SC 1573.

6(C) The Supreme Court in para 19 of the judgment observed as follows:

"19. In reaching this conclusion, we have been influenced by certain other considerations which are both relevant and material. In interpreting S. 43A, we think, it would be legitimate to assume that the legislature intended to respect the basic and elementary postulate of the rule of law, that in exercising their authority and in discharging their quasi-judicial function the Tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is of the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. If the exercise of discretion conferred on a quasi-judicial tribunal is controlled by any such direction, that forges fetters on the exercise of quasi-judicial authority and the presence of such fetters would make the exercise of such authority completely inconsistent with the well-accepted notion of judicial process. It is true that law can regulate the exercise of judicial powers. It may indicate by specific provisions on what matters the tribunals constituted by it should adjudicate. It may by specific provisions lay down the principles which have to be followed by the Tribunals in dealing with the said matters. The scope of the jurisdiction of the Tribunals constituted by statute can well be regulated by the statute and principles for guidance of the said tribunals may also be prescribed subject of course to the inevitable requirement that these provisions do not contravene the fundamental rights guaranteed by the Constitution. But what law and the provisions of law may legitimately do cannot be permitted to be done by administrative or executive orders. This position is so well established that we are reluctant to hold that in enacting S. 43A the Madras Legislature intended

> to confer power on the State Government to invade the domain of the exercise of judicial power. In fact, such had been the intention of the Madras Legislature and had been the true effect of the provisions of S. 43A. S.43A itself would amount to an unreasonable contravention of fundamental rights of citizens and may have to be struck down as unconstitutional. That is why the Madras High Court in dealing with the validity of S. 43A had expressly observed that what S. 43A purported to do was to clothe the Government with authority to issue directions of an administrative character and nothing more. It is somewhat unfortunate that though judicial decisions have always emphasised this aspect of the matter, occasion did not arise so long to consider the validity of the Government order which on the construction suggested by the Respondent would clearly invade the domain of quasi-judicial administration.

6(D) In the case of Orient Paper Mills Ltd vs Union of India reported in AIR 1969 SC 48 the appellant was carrying on business, interalia, of manufacturing and sale of various kinds of paper at its factory. In particular it manufactured "packing and wrapping paper" "printing and writing paper" and "machine glazed paper" popularly known as "M.G.Poster Paper". Upto February 28, 1961, the date on which Finance Bill of that year was introduced in Parliament, the printing and wrapping paper were subject to excise duty at the rate of 22 NP per Kilogram though the former was chargeable under item 17(3) and the later under item 17(4) of the First Schedule to the Act. The Finance Act, 1961 raised the excise duty payable under item 17(4) to 35 NP per Kilogram with effect from March 1, 1961. From March 1, 1961 to August 1, 1961 the excise officers levied duty on "M.G.Poster Paper" under item 17(3) at the rate of 22 NP per Kilogram. In other words, during that period the excise authorities treated "M.G.Poster paper" as "printing and writing paper". Subsequently, the excise authorities began to treat this paper as "packing and wrapping paper" and insisted on the appellant paying duty thereon under item 17(4). The appellant paid duty at that rate under protest and thereafter applied to the Assistant Collector for refund on the ground that the duty on that paper should have been levied under item 17(3) and consequently the duty collected was in excess of that leviable under law.The Assistant Collector rejected that claim. Consequently, the appellant went up in appeal to the Collector of Central Excise who rejected its appeal. The Collector rejected the appeal with the

following observations:

"The crucial point in appeal is whether the paper declared as "M.G.Poster paper" should be assessed as "packing and wrapping paper", other sorts under tariff item 17(4) or as "printing and writing paper, other sorts under tariff item 17(3).

The Central Board of Revenue have already made it clear that all types of poster paper of whatever colour including white should not be treated as "Printing and Writing paper" but as "packing and wrapping paper". As such the poster paper has not been wrongly assessed"

Then the matter was taken up in revision and the Government declined to interfere with the order in appeal. Said order was challenged in the Supreme Court. The Supreme Court in para 7 of the judgment has observed as under:

"There is hardly any doubt that the power exercised by the appellate authority, i.e. the Collector under section 35 is also a quasi judicial power. He is designated as an appellate authority, before him there was a lis between the appellant which had paid the duty and the Revenue, and his order is subject to revision by the Central Government. Therefore, it is obvious that the power exercised by him is a quasi judicial power".

After considering the fact that the Collector has relied upon Board's instructions the Supreme Court in para 12 observed as under:

"That apart, we are clearly of the opinion that even if the question of the legalityof the directions issued by the Board had not been taken before the authorities under the Act, as that direction completely vitiates the proceedings and makes a mockery of the judicial process. We think we ought to consider the legality of that direction. For the reasons already mentioned we hold that that direction was invalid and the same has vitiated the proceedings before the Collector as well as the Government".

The Supreme Court has set aside the order of the Collector, Government of India and allowed the petition.

6(E) In STATE OF U.P. AND OTHERS vs MAHARAJA

DHARMENDER PRASAD SINGH reported in (1989) 2 SCC 505 certain independent powers were exercised by the Govt in cancelling the permission. Said cancellation was challenged before the High Court . High Court allowed the petition and the matter came before the Supreme Court. In para 55 of the said judgment the Supreme Court after relying on passage from wellknown book of De Smith on "Judicial Review of Administrative Action" has held as follows:

"It is true that in exercise of powers of revoking or cancelling the permission is akin to and partakes of a quasi judicial complexion and that in exercising of the former power the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority can not permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the authority's discretion that is exercised but someone else's. If an authority "hands over its discretion to another body it acts ultra vires". Such an interference by a person or body extraneous to the power would plainly be contrary to the nature of the power conferred upon the authority. De Smith sums up the position thus:

The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what has not been authorised to do. It must act in good faith, must have regard to all relevant considerations, and must not be swayed by irrelevant considerations, must not seek

> to promote purpose alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusively".

6(F). In ANIRUDHSINHJI KARANSINHJI JADEJA vs STATE OF GUJARAT reported in AIR 1995 SC 2390 offence was committed under Terrorists and Disruptive Activities (Prevention) Act (TADA for short) the District Superintendent of Police did not give prior approval on its own but at the request of Additional Chief Secretary to grant approval under the Act which was granted. The Supreme Court after setting aside the order stated that "the dictation came on the prayer of the DSP will not make any difference to the principle".

6(G) In MANSUKHLAL VITHALDAS CHAUHAN vs STATE OF GUJARAT reported in (1997) 7 SCC 622 the Government did not grant sanction for prosecution of the appellant(public servant). The petition was filed in the High Court and the High Court directed the authorities to grant sanction the prosecution of the appellant. The Supreme Court after setting aside the judgment observed that "by issuing a direction to the Secretary to grant sanction, the High Court closed all other alternatives to the Secretary and compelled him to proceed only in one direction and to act only in one way, namely, to sanction the prosecution of the appellant. The Secretary was not allowed to consider whether it would be feasible to prosecute the appellant; whether the complaint of Harshadrai of illegal gratification which was sought to be supported by trap was false and whether the prosecution would be vexatious particularly as it was in the knowledge of the Government that the firm had been blacklisted once and there was demand for some amount to be paid to the Government by the firm in connection with the contract. The discretion not to sanction prosecution was thus taken away by the High Court.

6(H) It was further observed (on page 636) by the Supreme Court that "the High Court put the secretary in a piquant situation. While the Act gave him the discretion

to sanction or not to sanction the prosecution of the appellant, the judgment gave him no choice except to sanction the prosecution as any other decision would have exposed him to an action in contempt for not obeying the mandamus issued by the High Court. The High Court assumed the role of sanctioning authority, considered the whole matter, formed an opinion that it was a fit case in which sanction should be granted and because it itself could not grant sanction under the Act, it directed the Secretary to sanction the prosecution so that the sanction order may be treated to be the order passed by the Secretary and not that of the High Court. This is a classic case where a brand name is changed to give a new colour to the package without changing the contents thereof. In these circumstances, the sanction order can not but be held to be wholly erroneous having been passed mechanically at the instance of the high Court.

6(I) The Supreme Court further observed (page 637) that "From the notings of the Secretariat file, contained in Exh.70 as also the conflicting statements made by the Secretary and the Under-Secretary, it is not possible to hold as to who actually granted the sanction. The Gujarat High Court has held that the sanction was granted by the Deputy Secretary, Shri Lade (PW8) ignoring the fact that the file was also placed before the Secretary and he has also put his signature thereon. The file had, admittedly, been sent to the office of the Chief Minister from where it was received back on 30.1.1985 and as such it is not understandable as to how the sanction could be granted on 23.1.1985. This confusion also appears to be the result of the order passed by the High Court that the sanction must be granted within one month. The Secretary being the head of the department stated on oath that he had granted the sanction, particularly, as the mandamus was directed to him and he had complied with that direction. The Deputy Secretary, who actually issued the order of the sanction, had signed it and, therefore, he owned the sanction and stated that he had sanctioned the prosecution. Both tried to exhibit that they had faithfully obeyed the mandamus issued by the High Court and attempted to save their skin, destroying in the process the legality and validity of the sanction which constituted the basis of appellant's prosecution with the consequence that the whole proceedings stood void ab initio".

6(J) In this connection, we may also quote relevant paragraph from De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th edition (1995), Chapter 11 (Procedural Fairness:Fettering of Discretion):

"11-001. A decision making body exercising public functions which is entrusted with a direction must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. It may not fetter its discretion. A body that does fetter its discretion in that way may offend against either or both of two grounds of judicial review; the ground of legality and the ground of procedural propriety. It offends against legality by failing to use its powers in the way they were intended, namely, to employ and to utilise the discretion conferred upon it. It offends against procedural propriety by failing to permit affected persons to influence the use of that discretion. By failing to keep its mind 'ajar' by shutting its ears to an application the body in question effectively forecloses participation in the decision making process.

11-003 The rule against fettering discretion by no means forbids bodies upon which discretionary power has been conferred to guide the implementation of that discretion by means of a policy or a rule. It directs attention to the attitude of the decision maker, who must simply be prepared to make an exception to that rule or policy in a deserving case. Nor does the rule against fettering discretion focus upon the content of the hearing which must be afforded to persons interested in changing the decision maker's mind. The decision maker must allow interested individuals the opportunity to persuade him to amend or deviate from the rule or policy, but, unlike the principle of natural justice or fair hearing, the rule against fettering is not concerned with any particular form of hearing or with any particular technique of making or receiving representations".

6(K). We may also quote relevant part of Administrative Law by Prof.Wade & Forsyth, 7th Edition (paper back edition of 1995) on page 358:

Surrender, Adbication, dictation

Power in the wrong hands:

> Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with some one else, or may allow some one else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them. ....
>
> Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise".

6(L). In AHMEDABAD COTTON MGF CO.LTD vs UNION OF INDIA reported in 18 GLR 714 the petitions were filed by the petitioner-mill companies which were cotton textile units manufacturing blended cotton yarn which became dutiable for the first time under Tariff Item 18-E which was added on March 16, 1972 in the Central Excise and Salt Act, 1944. In all these mills, the duty was charged by the excise authorities under the Tariff Item 18-E on weight basis per kilogram of unsized yarn, that is to say, at the spindle point. However, by the Trade Notice issued by the Deputy Collector of Central Excise dated August 9, 1976 a change of basis has been adopted.

6(M). In that case the petitioner had also challenged the validity of the trade notice. It was the case of the petitioners that since the issue of the licence by the excise authorities for the manufacture of these polyester blended textiles, the petitioner had been consistently assessed to excise duty on yarn at spindle point and they maintained personal ledger account as provided by the Act and the Rules under the relevant self-assessment procedure. This Trade Notice was challenged as totally null and void and of no legal effect in these petitions where a further relief was claimed restraining respondents authorities from collecting or debiting any excise duty from the petitioners or in their personal ledger account on the basis of the weight of yarn manufactured by the petitioners after sizing instead of

at the spindle point, or from enforcing the letter at Annexure"A", dated October 19, 1976. On behalf of revenue it was submitted that the Trade Notice was for determining the general principles as to how the duty was to be levied under Tariff Item No.18-E and it was contended that the said general principles in the Trade Notice were not binding on the assessing authority. It was for the assessing authority to determine the question of assessment and while assessing, the assessing authority may follow the guidelines given in the trade notice. Therefore, it was contended the trade notice did not give any cause of action but only the assessment would give the cause of action. It was further contended that the petitions were premature and the petitioners must exhaust the remedy available to them before assessing authority. It was contended that the petitioners having not exhausted the remedies available under the Act, there was a bar to entertain and decide the petition under Article 226(3) and therefore the petition stood abated under section 58(2) of the Constitution (Forty Second Amendment)

6(N). In view of these rival contentions, the Full bench of this Court held as under:

Para 12(Page 727)

"12.We can not agree to that contention for the simple reason that although the writ jurisdiction has been restricted by specifying the particular purpose in clause (b) and (c) for which now the writ jurisdiction could be exercised, the grounds for such supervisory writ jurisdiction are still contraventions of constitutional or other provisions of law including orders, rules, regulations, bye-laws or other instruments made thereunder or the illegalities committed by the authorities acting under those provisions. Even this new ground would show that the distinction between a real and purported order which is an ultra vires order substantively or procedurally the authority by not remaining within the limited bounds or the mandate area or because of noncompliance of fundamental essential provisions of law or principles of natural justice which would make such orders nullities or ex facie without jurisdiction would be all the more material. If in England where the Parliament was supreme and where it had introduced non certiorari clauses in the Act of the Parliament this distinction had been adopted by the House of Lords in the decision in Anisminic Ltd vs Foreign

Compensation Commission (1969) All E.R.208 so that statutory tribunals and authorities would be kept within their limited bounds or the mandated area and would not become absolute, the same material distinction between a real purported order must be adopted when our Constitutional Amendment under Article 226(3) has not introduced the noncertiorari clause but has only introduced a mere fetter as to the stage at which the writ jurisdiction should be exercised after exhausting the alternative efficacious normal remedy under the law".

(Page 731)

"22. Therefore, the principle which emerges from these decisions is that when the petitioner is to be asked to exhaust his alternative remedies provided under the Act before entertaining the writ petition, this distinction would always be material where the order is a nullity as being ex facie without jurisdiction or due to noncompliance with the provisions of the Act or the essential principles of justice or on anyother ground as explained in Tarachand Gupta's case or Bhopal Sugar Industries case or Mohd. Nooh's case (supra) it is purported order or a nullity. In such a context the alternative remedy would be a futile remedy because it did not affect the inherent nullity in the challenged decision, which would result in the material distinction that the party may appeal against such decision but he was not bound to do so".

(Page 733)

"27. The aforesaid discussion clearly reveals that every Act would have to be examined when such a question of the existence of alternative remedy arises and it would have to be found out as to what is the amplitude of the normal Act remedies for appeal or revision so that the question of real or purported order would be decisive. If the Act remedy is so wide as to cover even purported orders so that no part of the activity of the authority is a collateral activity, the Act having provided for direct remedies to such a wide extent, that remedy would have to be first exhausted. On the other hand, where the Act remedies are not of such amplitude but only for orders under the Act, in cases of

such purported orders the appeal remedy could not come in the way of the petitioner as it could not be said to have been provided for such purported orders which are null and void and which it would not be obligatory for the petitioner to exhaust for the simple reason that such an appeal remedy would not be able to cure the defect even if the appeal confirms the original order bearing this indelible mark of nullity."

(Page 735)

"30. Therefore, it is in the light of the principles that we will have to answer the question of abatement raised before us by the learned counsel for the petitioners. The petitioners must succeed on both the questions raised by Mr.Sorabji. The present group of petitions would clearly fall within the Coffe Board Ratio as petitions for enforcement of fundamental rights to hold property under Article 31(1) as primafacie it is shown that the excise authorities are seeking to enforce this demand of excise duty arrogating a jurisdiction to themselves to change the settled basis of excise levy for this blended yarn for all these years by acting on the aforesaid trade notice issued by the Deputy Collector in breach of the principles of natural justice. At this stage, we have to see only the primafacie case as per the demurrer being clearly made out of want of jurisdiction or breach of principles of natural justice to entitle the petitioner to the assistance of this court because of the actual threat to their fundamental rights of holding the property under Article 31(1). Without even waiting for the final process of adjudication, the authorities are insisting on the compliance with the Trade Notice by changing the settled basis of the present excise levy. In any event, the petitioners must have succeed even on the second question because this would be a tax without authority of law so as to contravene Article 265, the other provision in the Constitution and the chalenge is on the ground of this action being ex facie without jurisdiction and in breach of the principles of natural justice by seeking to implement such executive instructions.".

After relying on the case of Orient Paper Mills Co.Ltd reported in AIR 1969 SC 48 at page 41 the court has

observed as under:

(page 736)

"32. Mr.Vakharia is right that assessing authority would have to reach its decision without the constraint of any such Trade Notice as even under Rule 233 what could be issued would be administrative instructions and not such a direction to change the basis of assessment: The questions at this stage is that a prima facie case does not exist when such an outsider like the Deputy Collector who was not an original assessing authority has issued such a direction in the form of a Trade Notice to all units stating that on this question it was decided that the accounting of the yarn in R. G. I. Register shall be made at the spindle point but for E.B. 4 Register or assessment of duty the weight on the yarn at the stage of cone, bobbins and beams etc. should be taken into account. The Superintendent, who is the assessing authority, even in the letter at Annexure `B' dated August 28, 1976 has invited the attention of the mills to this Trade Notice and as per the direction in paragraph 2 of the said Trade Notice has directed accounting of the yarn in R.G.I Register adding that for E.B. 4 Register or assessment of duty, the weight on the yarn at the stage of cones, bobbins and beams etc. should be taken into account and has requested the mills to maintain the E. B. 4 Register immediately. Even in Annexure `B' the Superintendent mentions that he had already directed that for assessment of this yarn the weight of the yarn should be taken at cones, beams, bobbins stage etc., and he objected to the duty being paid on the yarn at spindle stage and directed to adopt this changed basis. Therefore, the petitioners' property is sought to be reached by these directions. The executive Officers even though in the exercise of such quasi-judicial functions are bound to ignore such directions of their superiors, the fact remains that in the present case immediate implementation has started of this notice giving the right to move this Court to the petitioners because of the actual threat to their property rights before even they are heard."

(Page 737)

"33. In the present case the question is of excise duty for blended yarn under Tariff Item 18-E and the question is as to which standard should be adopted for its assessment as both the parties are agreed that yarn remains yarn and the dispute is as to whether yarn should be assessed at the spindle point or after its weight has increased in sizing. The eloquent contrast of Entry 18-E and the artificial definition of "manufacture" has been relied upon and the fact has been that all these years, right from 1972 when this Entry 18-E came in existence for the first time, the authorities themselves have adopted the basis of taxing this commodity only at the spindle point. Therefore, a prima facie case is made out both of invasion of fundamental rights and the order of the authorities being ex-facie without jurisdiction or a purported order when even without hearing the petitioners as per the essential principles of natural justice, the additional excise duty is sought to be recovered from then. Therefore, on both the grounds urged by Mr.Sorabji, the petitioners were entitled to approach this Court at this stage and the fetter created under Article 226(3) does not come in the way of the petitioners so far as the present group is concerned. We are clarifying that our observations are only to determine the prima facie case and they should not be construed as being on the merits of the question before us."

CONTENTIONS OF REVENUE:

7. Mr.B.B.Naik, learned Counsel appearing for the revenue made following submissions:

7(A). Mr.Naik submitted that all these cases are not applicable to the facts of the instant case particularly in the case of Ahmedabad Cotton Mfg.Co.Ltd vs Union of India reported in 18 GLR 714 as the petitioners have not only challenged the assessment order but also challenged the provisions of trade notice/circular whereas in this case the petitioner has challenged only the assessment order and has not challenged the circular. Therefore, these decisions are not applicable to the facts of the instant case.

7(B) Mr.Nayak, learned counsel further contended that looking to the prayers made in the petition, even if the Court comes to a conclusion that the writ of certiorari is required to be issued, writ of mandamus cannot be issued looking to the facts and circumstances of the

case. He submitted that even if the Court comes to a conclusion that interpretation of the provision as indicated in the circular is not binding to the assessee and the assessee is required to be granted refund and even as the circular has not been challenged, the writ of mandamus cannot be granted. He further submitted that there is no demand made by the assessee to the Assessing Officer for refund of the amount and therefore, there is no question of refusal by the authority for granting the refund, and therefore, the petition is not maintainable. He further submitted that the petitioner is claiming rights which are statutory in nature and statute has provided remedy by way of appeal and hence the present petition is not maintainable.

7(C) Under the Act, it is provided that it is the duty of the Assessing Officer to make regular assessment. The circulars issued by the Central Board of Direct Taxes should not be of such nature which whould curtail power of the Assessing Officer or would mandate the Assessing Officer to assess in a particular maner only. For the purpose of explaining the section or the rules, circular can be issued as mentioned in section 119 for the purpose of administration. For the purpose of just, proper and efficient management of the work of assessment and in public interest, circular can be issued and the circulars cannot be adverse to the assessee. The Assessing Officer exercises quasi-judicial functions and duty is cast upon him to act in judicial and independent manner. Other authority cannot control or affect his judgment in the mater of assessment. If the circular is issued then, the subordinate officer is bound to act accordingly and he will be in a helpless situation and will not be in a position to exercise his own independent judgment. The courts have pointed out again and again that no authority howsoever high can control administration of judicial or quasi-judicial authority, that being the essence of our judicial system.

7(D) It appears that the authority cannot term its discretion to be influenced by the dictation of others as it would amount to abdication. It would then not upon the authority's discretion that is exercised but someone else. If an authority hands over its discretion to another body, it acts ultra vires and such inference by a person or a body extraneous to the power would be plainly contrary to the nature of the power conferred upon the authority.

7(E) In our view, from the assessment order itself, it

becomes clear that though the Assessing Officer arrived at a conclusion that the taxable income when rounded of comes to Rs. 2,11,81,620/-, however, in view of the circular held that the income shall not be less than the returned income i.e. the income will be at Rs. 5,13,86,320/-. Thus, no room is left for exercise of discretion by the circular. The authority invested with the power has to act on its own but when the concerned authority does not apply its mind and take action, it would amount to non-exercise of power by the authority and the action would be bad.

7(F) Mr.Nayak, learned counsel contended that as pointed out by the Apex Court in the case of Bombay Metropolitan Region Development Authority, Bombay v. Gokak Patel Volkart Ltd. & ors. reported in 1995 (1) SCC 642 that where there is not only the existence of an alternative remedy but the writ petitioner actually had availed of that remedy. The writ petitioner appeal before the statutory authority was pending and the petition should not be entertained. Reliance was placed on the decision of the apex Court in the case of Titaghur Paper Mills Co. Ltd., & anr. v. State of Orissa & anr., reported in AIR 1983 SC 603 for the submission that the petition was not maintainable. In that case against the order of assessment made by the Sales Tax Officer instead of getting adequate redress against the wrongful acts complained of, the petition was filed and the appeal was also preferred.

7(G) It was contended by Mr.Nayak that the petition under Article 226 of the Constitution of India is not meant to short-circuit or circumvent the statutory procedures. It is only where statutory remedies are entirely ill suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to by-pass the alternative remedy provided by statute. Surely, matters involving the revenue where statutory remedies are available are not such matters. The Supreme Court took judicial notice of the fact that vast majority of the petitions under Article 226 of the Constitution of India are filed solely for the purpose of obtaining interim orders and thereafter petitioners prolong the proceedings by one device or the other. Before the Apex Court in the case of Asstt. Collector of Central Excise v. Dunlop India

Ltd. & ors. reported in AIR 1985 SC 330, Dunlop India Limited was respondent and the Apex Court pointed out that :

"In view of the Department, the Company was not entitled to the exemption as it had cleared the goods earlier without paying the central excise duty, but on furnishing Bank Guarantees under various interim orders of courts. The Court pointed out that even assuming that the Company had established a prima facie case, about which we do not express any opinion, we do not think that it was sufficient justification for granting interim orders otherwise as was done by the High Court. There was no question of any balance of convenience being in favour of the respondent-Company. The balance of convenience was certainly in favour of the Government of India. The Governments are not run on mere Bank Guarantees. We notice that very often some courts act as if furnishing a Bank Guarantee would meet the ends of justice. No Governmental business or for that matter no business of any kind can be run on mere Bank Guarantees. Liquid cash is necessary for running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest. We are very sorry to remark that these considerations have not been borne in mind by the High Court and interim order of this magnitude had been granted for the mere asking."

The Court in that case by an interim order allowed the benefit of exemption to the tune of Rs. 2,93,85,000/for which amount, the Company was directed to furnish the Bank Guarantee. In an appeal, the L.P.A. Court granted liberty to encash 30% of the Bank Guarantee.

7(H) In the instant case there is no question of granting any interim relief.

7(I) Mr.Nayak, learned counsel further submitted that in the case of Durga Prasad vs. Naveen Chandra & ors. reported in 1996(3) SCC 300, the apex Court has pointed out that the procedure prescribed under the Act cannot be by-passed by availing of the remedy under Article 226 of

the Constitution. In the case of Union of India v. V.I.P. Industries Ltd., reported in 1998 (8) SCC 457, the Assistant Collector allowed the application for a period in part and rejected the claim for the period beyond six months indicating that the claim was barred by limitation prescribed under the law. In writ petition, the Court directed the application for refund for the period for which the applicant's claim was considered as time barred without taking into consideration the question of limitation.

7(J) Mr.Nayak submitted that the Apex Court in the case of Commissioner of Income-Tax v. U.P. Forest Corporation reported in 230 ITR 945 has taken view that the High Court should not have entertained writ petitions when adequate alternative remedy was available to the assessee. No doubt, he submitted that under the facts and circumstances of the case and inasmuch as the litigation between the parties has been going on for numbers of years, the Court did not dismiss the appeal on this ground. He further submitted that in view of this decision, the Court should not interfere. The Court observed as under.

> "We, however, emphasise that petitioners should not normally short-circuit the procedure provided by the taxing statute and seek the redress by filing a petition under Article 226 of the Constitution of India."

7(K) Mr.Nayak, learned counsel submitted that the Apex Court in the case of Feldohf Auto & Gas Industries Ltd. & anr v. Union of India & anr. reported in 1998 (9) SCC 710 while accepting the contention that in the appeal, it will not be open to the assessee to challenge the validity of notification, directed the High Court to dispose of the writ petition in regard to the point of validity of the notification but so far as the other points concerning the details of the assessment, the Court directed that it should be agitated by the assessee in the regular appeals under the Act, if any. He therefore submitted that in view of this, as there is no challenge to the notification, or any other instrument, the question of filing the petition does not arise and the remedy available to the assessee is to approach an appellate forum and get the relief.

7(L) Mr.Nayak, learned counsel relying on the decision of the Apex Court in the case of Sri Ramdas Motor Transport Ltd. & ors. v. Tadi Adhinarayana Reddy & ors. reported in AIR 1997 SC 2189 submitted that the petition is not maintainable more particularly when in

that case the share holder has a very effective remedy under the Companies Act for prevention of oppression and mismanagement. The Court pointed out that the petition filed under section 397 & 398 cannot be an excuse for a shareholder to bypass the express provisions of the Companies Act.

7(M) Under the Companies Act, more satisfactory solution is available. Before the learned Single Judge, the grievance of the petitioner was that no orders have been passed despite the applications. The learned Single Judge rejected the contention and the appellate court entertained the appeal on the ground that the petition raised many serious issues as to falsification of the accounts of a public limited company. In para 13 of the judgment, the court pointed out the public interest and the Court directed as under.

> "... an investigation into the affairs of the company, bypassing the detailed provisions with inbuilt safeguards under the Companies Act, designed specially for this purpose. The only ground for intervention appears to be "public interest". There was a question of mismanagement of the affairs of the company and oppression of the minority shareholders. The other factor referred into the writ petition to invoke the doctrine of so-called public interest is the fact that the company had borrowed moneys from public institutions. This is no ground for not availing of the statutory remedies provided under the Companies Act before the appropriate statutory forums which are assigned for this very purpose."

7(N) Mr.Nayak, learned counsel submitted that in view of the decision in the case of State of Goa & ors. v. Leukoplast (India) Ltd. etc. reported in AIR 1997 SC 1875, the Court should not entertainthe writ petition. The said case makes it clear that it was the case of claim for refund wherein the questions of facts were required to be examined.

7(O) Mr.Nayak, learned counsel submitted that it is open to the Court to even interfere with an order of assessment non-granting the refund when there is a jurisdictional error.

7(P) Mr.Nayak submitted that the assessee has not made any demand and therefore, there is no question of issuance of writ of mandamus. He relied upon the judgment of the Apex Court in the case of State of Haryana vs. Chanan Mal etc. reported in AIR 1976 Sc 1654 wherein the Court has observed as under.

"Any petitioner who applies for a writ or order in the nature of a Mandamus should, in compliance with a well-known rule of practice, ordinarily, first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a Court for such an order even where the alleged obligation is established."

Mr. Nayak submitted that in the instant case, as no application is made to the Revenue for refund of the amount, there is no question of discharging its legal obligation and there is no question of refusal or neglecting to carry out the demand of payment and hence the petition is required to be rejected. However, he contended that in that case the petitioner has not only challenged the assessment but also made an application for refund whereas in the instant case the petitioner has challenged only the assessment and according to him the petition is liable to be rejected on that ground alone.

8. Mr.J.P.Shah, Learned counsel for the petitioner has relied upon following authorities in respect of contentions of the assessee:

8(A) In the case of Calcutta Discount Co.Ltd vs Income-Tax Officer, Companies District I, Calcutta & anr. reported in 41 ITR 191 SC = AIR 1961 SC 372 the Income-tax Officer issued notices under section 34 of the Incxome-tax Act, 1922 who had no material before him for believing that there had been no material non-disclosure by reason of which an under-assessment had taken place. The Apex Court pointed out as under.

"The Income-tax Officer had no jurisdiction to issue notices after the expiry of four years from the end of the assessment years."

In that case, the petition under Article 226 of the Constitution of India was filed. The Division Bench of Calcutta High Court reversed the order made by the learned Single Judge and rejected the petitioner's petition under Article 226 of the Constitution of India and hence the Apex Court was approached. Before the Apex Court, it was argued on behalf of the Assessing Officer that at the stage when the Income-tax Officer issued notices, he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot be

issued. The Apex Court pointed out as under.

"It is a well settled however that the writ of prohibition or certiorari would not issue against an executive authority, the High Courts had power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjected, or was likely to subject, a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or directions to prevent such consequences."

It was contended before the Court that that if the conditions precedent for assumption of jurisdiction under section 34 were not satisfied and came to the Court at the earliest opportunity. It was contended that there is nothing in its conduct which would justify refusal of proper relief under Article 226 of the Constitution of India. The Court observed as under.

"When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the Courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused. We have therefore come to the conclusion that the company was entitled to an order directing the Income-tax Officer not to take any action on the basis of the three impugned notices."

Thus, when the authority is acting without jurisdiction, the Court can interfere or in a case where a person is subjected to lengthy proceedings and unnecessary harassment. The Court is required to exercise its powers under Article 226 of the Constitution by issuing appropriate orders or directions to prevent such consequences.

8(B) In the case of State of UP vs Mohammed Nooh reported in 1958 AIR SC 86, the Court pointed out as under:

"There is no rule with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. Provided the requisite grounds exist, certiorari

will lie although a right of appeal has been conferred by statute. The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But the rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law. The superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a court of summary jurisdiction."

The Apex Court further pointed out that :

"If therefore,the existence of other adequate legal remedies is not per se a bar to the issue of a writ of certiorari and if in a proper case it may be the duty of the superior court to issue a writ of certiorari to correct the errors of an inferior court or tribunal called upon to exercise judicial or quasi judicial functions and not to relegate the petitioner to other legal remedies available to him and if the superior court can in a proper case exercise its jurisdiction in favour of a petitioner who has allowed the time to appeal to expire or has not perfected his appeal, e.g. by furnishing security required by the statute, it cannot then be laid down as an inflexible rule of law that the superior court must deny the writ when an inferior court or tribunal by discarding all principles of natural justice and all accepted rules of procedure arrived at a conclusion which shocks the sense of justice and fair play merely because such decision has been upheld by another inferior court or tribunal on appeal or revision."

The Apex Court approved the decision of the Bombay High Court in the case of Khurshed Modi v. Rent Controller, Bombay, reported in AIR 1947 Bom 46 (G), where it was held that the High Court would not refuse to issue a writ of certiorari merely because there was a right of appeal. It was recognized that ordinarily the High Court would

require the petitioner to have recourse to his ordinary remedies, but if it found that there had been a breach of fundamental principles of justice, the High Court would certainly not hesitate to issue a writ of certiorari. In para 10 of the said decision, the Apex Court pointed out that it is a rule of convenience rather than rule of law and instances are numerous where writ of certiorari has been issued inspite of the fact that the petitioner already had other adequate legal remedies.

8(C) In the case of Titaghur Paper Mills Co.Ltd vs State of Orissa reported in AIR 1983 SC 603, it is required to be noted that there was no suggestion that the learned Sales Tax Officer had no jurisdiction to make an assessment. It was contended that he had acted in breach of rules of natural justice. There was no denial the fact that the assessee was served with a notice of the proceedings under R. 12(5) of the Rules and sub-section (4) of S. 12 of the Act. The impugned order clearly indicated that the petitioners were afforded sufficient opportunity to place their case. The Court pointed out that merely because the Sales Tax Officer refused to grant any further adjournment and decided to proceed to best judgment, it cannot be said that he acted in violation of the rules of natural justice. In the instant case, there is no breach of rules of natural justice. In the instant case, it is contended by the assessee that in the assessment order itself, the Assessing Officer has referred to instructions issued by the CBDT and the order is vitiated on account of those instructions which are contrary to the provisions.

8(D) So far as the circular issued by the CBDT is concerned, which is alleged to have been issued under section 119 of the Act is also required to be considered from another angle. That refers to assessments which are to be made under section 143 (3) of the Act. Thus, in particular types of cases, direction is given to the Assessing Officers as to how the assessment is to be made i.e. in scrutiny cases under section 143(3) of the Act, neither the income can be assessed at a figure lower than the returned income nor the loss can be assessed at a figure higher than the loss nor further refund can be given except what was due on the basis of returned income. Thus, in all cases of scrutiny, direction is given despite the fact that section mandates that no such order, instruction or direction shall be issued to require any Income-tax authority to make particular assessment or to dispose of a particular case in particular manner. The Income-tax authority is thus by issuance of circular directed the quasi-judicial officer

to assess cases of particular nature in a particular manner.

8(E) In the case of J.K.Synthetics Ltd vs O.S. Bajpai, Income-tax Officer, Central Circle V, Kanpur & anr. reported in (1976) 105 ITR 864, the Division Bench considered the effect of circular. In the said judgment, the Court pointed out as under.

"An Income-tax Officer acts as a quasi-judicial authority when he deals with an assessment. The assessment order is a quasi-judicial order. The power to decide controversies in assessment proceedings has been exclusively vested in him. He cannot seek guidance from any source or authority nor is any authority empowered to issue to him any direction or instruction in this behalf. The Board, no doubt, is the supreme authority under the Income-tax Act and under section 119, the Income-tax Officer is bound to follow the orders, directions and instructions of the Board but such instructions, in our opinion, must relate to his executive functions. No instruction can be issued to him with regard to any controversy arising before him in an assessment proceeding. In S.B. Adityan v. First Income-tax Officer, the Madras High Court had to deal with a similar question under section 5(8) of the Indian Income-tax Act, 1922, which corresponds to section 119 of the Income-tax Act, 1961. This is what their Lordships observed at page 460;

Whatever may be the true position of the Board, as the topmost administrative authority, it cannot, in our opinion, tell the assessing authority, the Income-tax Officer, what to do and what not to do in regard to a particular assessment. It would not follow from section 5(8) that except the Appellate Assistant Commissioner, the other authorities would be subject to the control of the Board in the matter of any assessment. The Board with all the plenitude of its powers cannot direct any Income-tax Officer to tax `A' or not to tax `(b)'. Such a power if assumed to exist in the Board would be calculated to deprive the assessing officer of his statutory function and would be against the grain of the judicial powers which the officer is supposed to exercise."

8(F) The Apex Court in the case of Ram & Shyam Co. v. State of Haryana & ors. reported in AIR 1985 SC 1147 pointed out that;

"At any rate it does not oust the jurisdiction of the Court. Where, the order complained against is alleged to be illegal or invalid as being contrary to law, a petition at the instance of person adversely affected by it, would lie to the High Court under Art. 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer or the State Government. An appeal in all cases cannot be said to provide in all situations an alternative effective remedy keeping aside the nice distinction between jurisdiction and merits."

8(G) The Apex Court in the case of Champalal Binani v. Commissioner of Income-tax, West Bengal & ors. reported in (1970) 76 ITR indicating that the petition should not be entertained, pointed out as under :

"Where the aggrieved party has an alternative remedy, the High Court would be slow to entertain a petition challenging an order of a taxing authority which is, ex facie, with jurisdiction. A petition for a writ of certiorari may lie to the High Court where the order is on the face of it erroneous or raises the question of jurisdiction or of infringement of fundamental rights of the petitioner. The Income-tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities and normally the party feeling aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach High Court directly against the action."

8(H) In the case of Whirlpool Corpn vs Registrar of Trade Marks, Mumbai & ors., reported in AIR 1999 SC 22, the Apex Court pointed in para 20 as under.

"Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, inspite of the alternative statutory remedies, is not affected specifically

in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

9. In our opinion, after examining all these authorities, it appears that the learned counsel for the revenue has not addressed us about the proper question and we have gone through the principles laid down by the Supreme Court which have been cited by him. However, as contended by the learned counsel for the assessee that there was a circular and the Assessing Officer is bound by it and he has abdicated his function and did not act independently and therefore there is no question of alternative remedy. This aspect has not been focussed by the learned counsel for the revenue.

9(A). As regards merits of the matter, he has cited the case of COMMISSIONER OF INCOME TAX vs BAKELITE HYLAM LTD reported in 237 ITR 392. In that case it was required to consider an identical issue on reference. In that case the assessee-company filed its return for the assessment year 1989-90 on December 29, 1989 admitting net income of Rs.2,32,41,730/-. The return was processed under Section 143(1) of the Act accepting the returned income and an intimation to that effect was issued to the assessee company which resulted in a refund of Rs.1,08,00,894/-. Out of said amount certain sum was adjusted towards tax arrears and the balance was refunded to the assessee company. Subsequently, the case of the assessee-company was taken up for scrutiny under section 143(3) of the Act. The Assessing Officer determined the taxable income which resulted in further refund of Rs.44,82,929. The revenue was of the view that the income assessed by the Assessing Officer in respect of the assessee company under section 143(3) of the Act could neither be less than the returned income shown by the assessee company nor a further refund can be given except what was due on the basis of return which was already allowed while making the provisional assessment under section 143(1)(a) of the Act. The revenue was of the further view that the order of assessment made by the assessing officer on March 27, 1992 was also contrary to the instructions of the CBDT in Reference No.549 dated October 31, 1989. Therefore, the Commissioner of Income Tax initiated revisional proceedings under section 263 of the Act for setting aside the assessment made under section 143(3). The assessee contended that the assessment order dated March 27, 1992 was in accordance with law and the assessing officer had rightly allowed the deduction being the differential value of opening and closing stocks

following consistently the method of valuation and the interests of revenue had not suffered. The assessee also contended that in terms of section 237 of the Income Tax Act, the assessee was entitled to the refund arising on the assessment or otherwise of the amount which had been paid in excess of tax payable by it under the Act. The Commissioner of Income Tax however rejected the objections raised by the assessee company and by his order dated March 17, 1993 directed the assessing officer to modify the assessment order in such a way that the income determined would not be less than the returned income and no refund shall arise thereby. Against the order passed by the Commissioner of Income Tax which was passed under section 263 of the Act, the assessee company filed Income Tax Application No.950(Hyd) of 1993 before the Income Tax Appellate Tribunal , Hyderabad "(b)" branch contending that the view taken by the Commissioner of Income Tax that with effect from 1.4.1989 an assessment made under section 143(3) of the Act can not result in a refund is erroneous. On consideration of the submissions and relevant provisions the Tribunal allowed the appeal filed by the assessee company and set aside the order passed by the Commissioner of Income under section 263 of the Act by order dated March 30, 1994. Aggrieved by the said order of the Tribunal the revenue filed R.A.No.381/Hyd of 1994 under section 256(1) of the Act formulating two questions of law and required the Tribunal to state the case and refer the questions of law for the opinion of the Court which have been referred by the Tribunal as under:

"(1) Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in law in vacating the order under section 263 dated March 17, 1993 passed by the Commissioner of Income Tax?

(2) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in coming to the conclusion that an assessment made under section 143(3) can result in refund with effect from April 1, 1989?"

10. However, by an order dated January 23, 1995 the Tribunal rejected the said RA holding that no referable question of law arises for seeking opinion of the court. Against said order of the Tribunal the revenue has preferred the ITC under section 256(2) of the Act.In that context, the Division Bench of Andhra Pradesh High Court held as under:

"On a reading of clause ((b)) of subsection (4) of Section 143 of the Act, it is clear that on an assessment made under section 143(1)(a) of the Act, and such assessment results in refund, if such refund exceeds the amount refundable on regular assessment made under section 143(3) of the Act, the whole or excess amount so refunded shall be deemed to be tax payable by the Assessee. In other words, in regular assessment the tax liability is determined on the basis of giving credit to all the deductions the assessee is entitled to notwithstanding the fact of the assessment made under section 143(1)(a) of the Act. On a careful examination of the words so used in clause ((b)) of subsection (4) of section 143 of the Act, we can not borrow a different meaning than the one intended by the legislature to say that the legislature did not visualise a situation permitting the assessing authority to grant refund also under regular assessment in favour of an assessee.

Thereafter referring to the judgment in the case of LML LTD vs M.K.VENKATARAMAN, ASSTT.CIT reported in (1994) ITR 585(Bom) the court has observed as under:

"The Division Bench in the said decision has no occasion to deal with a question as to whether the assessing authority had the power to order refund while making a regular assessment under section 143(3) of the Act. We are, therefore, of the view that this decision can not render any assistance to the Revenue to say that the decision of the Bombay High Court is in line with the thinking of the revenue. Merely because there are certain departmental instructions as provided in Circular Reference No. 549 dated October 31, 1989, issued by the Central Board of Direct Taxes should bind the assessing authority even bypassing the provisions of the Income Tax Act."

Thereafter the court rejected the reference application.

10(A). The aforesaid judgment gives complete answer to the contentions of revenue on merits of the matter and therefore we are inclined to entertain the petition on merits of the matter and do not relegate the petitioner to avail alternative remedy provided under the Act which is also futile remedy.

11. In the instant case, soon after the assessment order was made, the petitioner approached this Court and the Court issued rule on 28.4.99 which was made returnable on 3.5.99 i.e. soon after the order the Court was approached. In the instant case, even for the sake of arguments, if it was pointed out by filing an affidavit that the Assessing Officer has wrongly allowed certain deductions or has assessed incorrectly, the matter would have been different. The matter is argued only on the point that despite the fact that the Assessing Officer has come to a conclusion that the assessed income is lower than the returned income, the assessee is not entitled to refund (on account of circular of C.B.D.T) and that this Court should not entertain the writ petition when the appellate forum is provided. The Apex Court as a matter of fact has pointed out that the Courts would be failing to perform their duty if relief is refused. It is not a case where the facts are to be appreciated, and therefore, the assessment order as it is is to be considered. In the instant case, as pointed out that the decision is not of the Assessing Officer but of the CBDT in view of circular and the fact referred in the order that in view of the circular assessed income shall not be less than the returned income makes it clear that the decision is not of the Assessing Officer. Thus, the Assessing Officer's order is vitiated on account of instructions. This can not be cured even by the appellate authority. As the Assessing Officer himself has not exercised the jurisdiction vested in him, the order is vitiated and is required to be quashed and set aside and if the Court is not entertaining the petition, would fail in discharge of its duties.

12. Thus, it is clear that ordinarily when an alternative remedy is provided, the High Court should not exercise jurisdiction but it does not mean that when the order passed by the authority is bad and illegal, Court can not exercise the jurisdiction. The remedy must not be only alternative but it must be efficacious also. In the instant case, the Assessing Officer has not passed the order independently as pointed out earlier, but in fact, jurisdiction is exercised by CBDT by issuing circular and therefore the order is without jurisdiction. Division Bench of the Andhra Pradesh High Court in the case of C.I.T. v. Bakelite Hylam Ltd. (supra) held that the Assessing Officer rightly refunded the amount. We are in agreement with the views expressed by the Andhra Pradesh High Court and therefore also, it would amount to unnecessary harassment if the assessee is asked

to stand in queue. It is also required to be noted that the appeal in the instant case would not be a proper remedy. The appeal would lie against the real order and not purported orders and therefore, the appellate remedy could not come in the way of the petitioner as it could not be said to have been provided for such purported orders which are void in law and therefore, it would not be obligatory for the petitioner to exhaust the remedy of appeal to cure the defect. Therefore, in our opinion, this Court must exercise the jurisdiction under Article 226 of the Constitution of India.

13. However, in our opinion the rule that the court would not entertain a writ petition under Article 226, if there was an alternative remedy was a rule of judicial policy. "It was a rule of policy, convenience and discretion rather than a rule of law." If the alternative remedy was onerous and burdensome or the decision of an authority was without jurisdiction or in violation of the rules of natural justice or there was an error of law apparent on the face of the record, or where the statute under which an administrative order was passed was unconstitutional, the courts granted the remedy under Article 226. In our opinion, though the learned counsel appearing for the revenue has relied upon several judgments of the Supreme Court regarding alternative remedy, the same are not applicable to the present case. In our view even if the petitioner files appeal before the Commissioner of Income Tax, the Commissioner of Income Tax would be guided by what the circular of the CDBT says and therefore the remedy provided by way of appeal under the Act is futile and therefore also we are inclined to entertain this petition.

14. In our opinion, the view which are taking is also fortified by the proviso to Section 119 of the Act which specifically provides that the Board can not issue instructions to the Income Tax authority to make a particular assessment or to dispose of a particular case in a particular manner as well as not to interfere with the discretion of the Commissioner in exercise of his appellate functions.

15. In fact, similar provisions like Section 119 of I.T.Act is also found in the Central Excise and Salt Act, 1944. It may be noted that the legislature were aware about the judgment of the Supreme Court in the case of Orient Paper Mills and after that it has inserted Section 37B by Amending Act 79 of 1985 which reads as under:

"37B. Instructions to Central Excise Officers:

The Central Board of Excise and Customs under the Central Boards of Revenue Act, 1963 (54 of 1963) may, if it considers it necessary or expedient so to do for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods, issue such orders, instructions and directions to the Central Excise Officers as it may deem fit, and such officers and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board.

Provided that no such orders, instructions or directions shall be issued--

(a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner; or

((b)) so as to interfere with the discretion of the Collector of Central Excise (Appeals) in the exercise of his appellate functions."

The proviso to section 37B is in parimateria with the provisions of Section 119 of the Income Tax Act and therefore the view which we are taking is in consonance with the view taken by the legislature in the Amending Act.

16. In this case according to us the Assessing Officer was not bound by the said circular and yet the Assessing Officer has considered the circular and therefore he has not exercised powers independently. He has not exercised his own discretion.

17. In the instant case, therefore, in paragraph 12, after rounding of the taxable income, following paragraph found in the assessment order, which reads as under, is quashed and set aside.

"However, as per the CBDT, New Delhi's circular No. 549 para No.5.12 dt. 31.10.1989, the assessed income shall not be less than returned income. In view of the above, the total income will be Rs. 5,13,86,320/-."

18. The Assessing Officer shall make assessment order

without keeping in mind the circular which he has referred to in the assessment order within a period one month from the date of receipt of the writ.

(B.C. PATEL, J.)

(K.M. MEHTA, J.)